construct the three water tanks in question was wrong as being unjustified on all the evidence before him. I need only reaffirm that a question of fact is pre-eminently a matter for the trial court and I have not been persuaded that the reasons given by the trial judge are unsatisfactory or that there was any misdirection of himself or that he had not drawn the proper inferences.

For all these reasons I would allow the appeal with costs here and in the court below.

Tan Ah Tah F.J. and **Winslow J.** concurred.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Laycock & Ong.*

EMPLOYEES PROVIDENT FUND BOARD v. BATA SHOE CO. (M) LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) February 19, 1968]

[K.L. — Federal Court Civil Appeal No. X. 84 of 1966]

Provident Fund — Liability of employer — "Contract of service" — Validity of contract between parties — Employees Provident Fund Ordinance, 1951, s. 2.

Contract — Freedom of — "Avoidance" and "evasion" — "Authority" and "power".

This was an appeal against the decision of Gill J. ([1967] 1 M.L.J. 120) who had held that there was no relationship of employer and employee between the Bata Shoe Co. (M) Ltd. and the salesmen employed by the managers of the company's retail shops. Under the agreement between the company and the managers, the managers were given power to employ persons to assist them and it was stated that the managers would be responsible for payments under the Employees Provident Fund Ordinance.

Held, dismissing the appeal: (1) construing a "contract of service" in section 2 of the Employees Provident Fund Ordinance does not require the court to go beyond ascertaining whether such a contract existed or not, to the extent of exploring the wider field of an employee's liability for the unauthorised acts of putative agents;

(2) the contract between the company and the managers was a valid one and it was clear that under it the managers and not the company were the employers and therefore the company was not liable to contribute to the Employees Provident Fund.

Cases referred to:—

(1) *Connecticut Fire Insurance Co.* v. *Kavanagh* [1892] A.C. 473, 480.

(2) *Levene* v. *Inland Revenue Commissioners* [1928] A.C. 217, 227.

(3) *Bullivant* v. *Attorney General for Victoria* [1901] A.C. 196, 207.

(4) *Scammell* v. *Ouston* [1941] A.C. 251, 272.

(5) *Allen* v. *Thorn Electrical Industries Ltd.* [1967] 3 W.L.R. 858.

FEDERAL COURT.

Yong Pung-How for the appellants.

M. Shanker for the respondents.

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal by the Employees Provident Fund Board against the judgment of Gill J., declaring that there was no relationship of employer and employee, within the terms of the Employees Provident Fund Ordinance, 1951, subsisting between the Bata Shoe Company (Malaya) Ltd. and salesmen employed by managers of the company's retail shops and declaring, further, that the company was and is under no liability to make contributions to the board's fund in respect of such employees.

Originally the main grounds of appeal were: (a) that, having found as a fact that the retail shop managers were themselves employees of the company, the learned judge should have found that the shop employees were also employees of the company; (b) that, notwithstanding the absence of an express contract between the company and such employees, yet, *vis-a-vis* the board, these employees should be deemed to be in law the employees of the company, and (c) that the learned judge should have held them to be the company's employees since they came to be employed as such "through the agency of the shop managers acting within the scope of their authority."

Application was subsequently made, after time, to add a further ground as follows:—

> "That the provision in clause 9 of the shop manager's contract to the effect that he is the employer of such salesmen, etc., should be rejected as repugnant to the contract as a whole, as a servant who has authority to employ other servants about his master's business, *must necessarily have authority to create a contract between such other servants and his master.*"

The application was stoutly opposed by counsel for the appellant, who submitted that, on the authorities cited by him, the principle which appears to be established is that a new point of law will not be allowed to be raised for the first time on appeal, even though such point related only to the construction of documents. The majority view in this court being in favour of allowing the application, I need only say that I concurred, without having formed any definite conclusions as to the principles deducible from the many cases cited to us. For my own part, however, I should add that I respectfully incline to the views expressed by Lord Watson in *Connecticut Fire Insurance Co.* v. *Kavanagh*,[1] particularly as, in the instant case, I think no artificial barriers should be erected so as to prevent the agreement being considered as a whole.

Before discussing the grounds of appeal I would, with respect, express, first of all, my admiration of the judgment delivered by the learned judge, than which I have rarely seen a better, and next, my deep indebtedness to learned counsel on both sides for the great assistance afforded me by their written submissions which,

in this case, were made at our request. As expected naturally of them, their arguments have displayed the utmost candour, so that we are fortunate to be able to see the issues clearly raised and settled, without the same being found in the least obfuscated by clouds of argument. I need, therefore, make no apology for not discussing, at length, either the persuasive arguments addressed to us, or the long and interesting list of authorities which to me have been most instructive. The reason I have been able to do so is that, in my judgment, the question of the company's liability for contributions to the provident fund cannot but turn exclusively on whether or not there was, both in law *and in fact*, a contract of service subsisting between the company and the employees of the retail shop managers.

For present purposes I think it is superfluous to enter into the details of the agreement made between the company and its managers, or the evidence showing how this agreement was observed in practice. The broad facts have been fully set out in the judgment of the learned judge, thus sparing me the necessity of repeating them herein. The crux of the whole case simply was whether or not the special provisions of clause 9 of the agreement did have the effect of preventing the legal relationship of employer and employee from arising, as in the normal case it should have done, had there been no express stipulation to the contrary. Clause 9 reads as follows:—

> "During the continuance and subject to the provisions of this agreement and to any orders or directions from time to time given to him by the company the employee shall have the general control of the business of the shop. To assist him in the conduct of the business, he may employ any salesman, salesgirl, clerk or servant and may agree with such person the terms and the rates of remuneration for his/her services provided they comply with the requirements of the laws of the country and further provided that it is understood and agreed upon that he is the employer of such salesmen, salesgirls, clerks or servants. The employee shall nevertheless be and remain responsible to the company for the acts, neglects and defaults of such salesmen, salesgirls, clerks or servants and shall upon being so required by the company dismiss any or all of such salesmen, salesgirls, clerks or servants."

In construing a contract the governing principle is to ascertain the intention of the parties through the words they have used. Clause 9, to my mind, is perfectly clear in stipulating that the employers of shop assistants should be the managers and not the company. It is equally clear that the object of the contracting parties was to make the managers, rather than the company, liable for contributions to the Employees Provident Fund. I am aware of no rule of law which restricts freedom of contract so as to debar them from doing so, if that was their wish. The courts cannot interfere to prevent a mere evasion of a statute. Thus what Lord Sumner said in *Levene* v. *Inland Revenue Commissioners*,[2] is very much to the point here:—

> "It is trite law that His Majesty's subjects are free if they care to make their own arrangements so that their cases may fall outside the scope of the taxing Acts. They incur no legal penalties and, strictly speaking, no moral censure, if, having considered the lines drawn by the legislature for the imposition of taxes, they make it their business to walk outside them."

Avoidance, by legitimate means is, of course, different from evasion in the pejorative sense as explained in *Bullivant* v. *Attorney General for Victoria* [3] by Lord Lindley:—

> "As I have said, there are two ways of construing the word 'evade': one is, that a person may go to a solicitor and ask him how to keep out of an Act of Parliament — how to do something which does not bring him within the scope of it. That is evading in one sense, but there is nothing illegal in it. The other is, when he goes to his solicitor and says, 'Tell me how to escape from the consequences of the Act of Parliament, although I am brought within it.' This is an act of quite a different character."

Now, in view of the clear expression of intention in clause 9, could the court "make a contract for the parties?" Could it "go outside the words they had used except in so far as there were appropriate implications by law, as for instance, the implication of what was just and reasonable, when the contractual intention was clear, but the contract was silent in some detail which the court would thus fill in?" The answer plainly is no, according to Lord Wright in *Scammell* v. *Ouston*.[4]

I now turn to the Ordinance under which liability for contributions is sought to be imputed to the company itself. This liability has its roots in the definitions in section 2 of "employee" and "employer", in both of which the essential feature is a "contract of service."

Whether or not there was a contract of service and between whom is a pure question of fact. It has been conceded by counsel for the board that there was no privity of contract between the company and the manager's employees. Neither was it possible to conclude that such privity of contract was established between these remote parties by the act of the managers, as agents of the principal, for the very reason that the managers had in express terms been prohibited from doing any such thing. As counsel for the board again has properly admitted "privity of contract between the salesman and the company cannot therefore be established on the basis that the shop manager had actual authority to establish such privity, because it is plain that he did not."

The board, consequently, has to fall back on o*stensible* authority, on the principle that what the servant does, within the scope of his apparent authority binds the master, notwithstanding express prohibition of such act, if such prohibition is unknown to the third party who seeks to hold

the master liable. It was accordingly submitted that, on the evidence, the court would be fully justified in coming to the conclusion that the salesman was employed "under a contract of service by somebody". Carrying this argument a stage further, it was finally contended that, while control of the salesman was in practice exercised by the manager, the power of control resides ultimately in the company. With respect, it seems to me that this argument confuses "authority" with "power". The former applies to the legal relationship existing in fact between principal and agent, that is to say, it looks to the agreement between them for what the agent may or may not do. "Power", on the other hand, is concerned with third parties, who are brought into legal relations with the principal through the agent, whose acts bind the principal if the latter is considered to have held him out as invested with the authority believed in by the third party acting on the faith thereof, even though such belief was erroneous. In my judgment, construing a "contract of service" in section 2 of the Ordinance does not require us to go beyond ascertaining whether such a contract exists or not, to the extent of exploring the wider field of an employer's liability for the unauthorised acts of putative agents. If I have not erred seriously I think what I have just stated was the substance of the board's case.

With all respect, the short answer is that, whether there was a contract of service between salesman and manager or between salesman and company is, as I said before, purely a question of fact. The truth is that, in the nature of things, the two contracts cannot simultaneously co-exist. It may be that in law, the company could in certain circumstances, be liable for the acts and defaults of the salesman, but the ground of liability in such a case is not based on the actual existence of a contract of service, but on the principle of "ostensible authority" and "holding out", which naturally postulates that superior evidence of the employer's liability, namely, the contract of service, was non-existent. In such cases the fact that no such contract exists does not avail the employer because a notional contract is implied by law merely in order that an employer shall not evade liability to a third party for the act of the putative servant acting with ostensible authority. In other words, liability rests on a legal fiction which, merely because it is accepted, does not thereby become elevated to the status of a fact.

Before I conclude, I think it is not out of place to refer to the recent English case of *Allen* v. *Thorn Electrical Industries Ltd.*,[5] arising out of the "wage freeze" in July 1966, where contractual claims for wage increases fell to be considered in the light of restrictive legislation. In that case the word "paid" in sections 28, 29 and 30 of the Prices and Incomes Act, 1966 was construed in the manner which I think "contract of service" in section 2 of the Employees Provident Fund Ordinance 1951 should also be construed. As Lord Denning M.R. said:—

> "Taken literally. the word 'paid' does mean actually paid in cash. It means the money which the man receives in his pay packet. That is how we were invited to construe it here. The draftsman of this Act was, it was suggested, a learned pedant who used words with meticulous accuracy. I decline to accept this invitation. We are not the slaves of words but their masters. We sit here to give them their natural and ordinary meaning in the context in which we find them."

And this was what Danckwerts L.J. said:—

> "These statutory provisions are penal and are designed to interfere with rights of contract and the pre-existing legal position of free citizens of this country. Well-established principles, therefore apply to the situation. Existing legal rights are not to be taken away except by clear words in the statute. If two constructions are possible, the construction which produces unreason and hardship is to be avoided, and the construction which interferes with the legal rights of the subject to a lesser extent and produces the less hardship is to be preferred."

Finally, there was the express provision in clause 5(f) that the managers were to be "solely responsible" for all payments under the Employees Provident Fund Ordinance. This should be the most cogent ground for dismissing this appeal because I see no reason why the board should be entitled to dictate who should pay the contributions when the parties responsible have already agreed that one, but not the other, should be liable.

I would dismiss this appeal with costs.

Barakbah L.P. and **Azmi C.J. (Malaya)** concurred.

Appeal dismissed.

Solicitors: *Shook Lin & Bok; Shearn, Delamore & Co.*

PUBLIC PROSECUTOR v. YUVARAJ

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) February 19, 1968]

[K.L. — Criminal Reference No. X. 1 of 1967]

Bribery and Corruption — Presumption of corruption against accused — Degree of proof required to rebut presumption — Whether on balance of probabilities or beyond reasonable doubt — Prevention of Corruption Act, 1961, ss. 4(a) and 14.

Criminal Law — Evidence — Burden of proof — Corruption — Gift to public servant — Offence — "Unless the contrary is proved" — Prevention of Corruption Act, 1961, ss. 4(a) and 14.

Evidence — Burden of proof — Quantum of proof required of the defence — Evidence Ordinance, 1950, ss. 3 & 105.

This was a reference to the Federal Court on the question of law as to the degree of proof necessary to rebut a statutory presumption raised against an accused person. Under section 14 of the Prevention of Corrup-